U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 2 6 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth M'Cormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a software development services company. It seeks to permanently employ the beneficiary in the United States as a software engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor accompanied the petition. The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 12, 2012. *See* 8 C.F.R. § 204.5(d).

The director determined that the petitioner failed to demonstrate that the labor certification required an advanced degree for the position so that the category requested was inapplicable and that the petitioner failed to demonstrate the ability to pay the proffered wage from the priority date onwards.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in part:

> The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

H.4. Education: Master's (Computer Science).
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.8. Alternate combination of education and experience: Accepted.
H.8-A. Other education accepted: Bachelor's (Computer Science, CIS, Engineering, Math, Electronics, Business, Management, Technology, or related)
H.8-C. Number of years experience acceptable: 5 years.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: Not Accepted.
H.14. Specific skills or other requirements: * Position requires extended travel and/or relocation

to project sites/locations throughout the United States
** Employer defines a foreign educational equivalent in No. 9 to include: a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a Master's Degree.
*** New SOC (ONET/OES) Code – 15-1132, Software Developer, Applications.

The director held that the language provided in the provision in H.14 that a "foreign educational equivalent" could be "a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a Master's Degree" meant that the petition does not qualify for advanced degree professional classification. The petitioner states that the language referred to by the director was included due to DOL requirements stemming from *Matter of Francis Kellogg,* 94 INA 465 (BALCA 1998) ("*Kellogg* language"). The Board of Alien Labor Certification Appeals (BALCA) stated that where a petitioner lists alternative job requirements, they may not be unlawfully tailored to the sponsored worker's qualifications, but must instead indicate that "applicants with any suitable combination of education, training, or experience are acceptable." The instant labor certification states that the petitioner intends "a foreign educational equivalent" to include "a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a Master's Degree." 8 C.F.R. § 204.5(k)(3)(i) specifically provides that a degree or foreign degree equivalent is required for the classification; equivalencies based on training or experience do not support the category.

The petitioner relies upon an article written by [redacted] to support its assertion that it was required to use the *Kellogg* language on the instant labor certification. As noted in Mr. [redacted] article, 20 C.F.R. § 656.17(h)(4) requires language similar to that found in *Kellogg:* "any suitable combination of education, training, or experience." The regulation, however, states that the *Kellogg* language is only required "if the alien already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements." Here, the beneficiary qualifies based on the primary job requirement of holding a Master's degree. In addition, the article specifically notes that BALCA, in *Matter of Agma Systems,* 2009 PER 132 (BALCA 2009), held that where the alternate requirements were equivalent, no *Kellogg* language was required. In *Agma Systems,* the equivalent terms were a Master's degree or a Bachelor's degree plus five years of experience, i.e. the same equivalency presented in the instant case. This article, thus, does not support the petitioner's assertion that it was required to include such equivalency language to have the labor certification certified by DOL.

Counsel also cites to notes from an April 19, 2006 American Immigration Lawyers' Association (AILA) visit with USCIS officials concerning the processing of Forms I-140. In Question 1, USCIS indicated that petitions would not be denied for using the *Kellogg* language where "the individual meets alternative requirements set forth in the PERM application." As stated above, the *Kellogg* language would not have been required on the instant labor certification.

In any event, it is important to note that the language included on the instant labor certification is not *Kellogg* language. The *Kellogg* language states: "any suitable combination of education, training, or experience" while the labor certification states that the petitioner would accept "a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a Master's Degree." The language included by the petitioner on this labor certification was not general in nature like the *Kellogg* language, but was instead specific to the instant requirements and set of circumstances.

On appeal, counsel specifies that the language in H.14 states that the petitioner would accept only an "academic" equivalent to a Master's degree, so that equivalencies based on training or experience would not be sufficient. Even if we were to accept counsel's interpretation of the language on H.14, the language would allow for an applicant to qualify with an Associate's degree plus training certificates if a credential evaluator stated that this education and training were equivalent to a Master's degree. The language in H.14, as interpreted by counsel, would thus allow for a potential applicant to qualify with less than a bachelor's and/or master's degree, which is not contemplated by the regulations. When determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). As the additional requirements in H.14 allow for an applicant with less than a bachelor's degree plus five years of experience or a master's degree to qualify for the position, the labor certification does not support the advanced degree professional immigrant category and the petition must be denied.

Concerning the petitioner's ability to pay the proffered wage, the regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on April 12, 2012. The proffered wage as stated on the ETA Form 9089 is $101,700 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2005, to have a gross annual income of over $5.7 million, and to currently employ 40 workers. According to the tax returns in the

record, the petitioner's fiscal year is the same as the calendar year. On the ETA Form 9089, signed by the beneficiary on August 27, 2012, the beneficiary claimed to have begun working for the petitioner on September 11, 2008.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted a Form W-2 stating that it paid the beneficiary $98,211.89 in 2012.[2] The petitioner also submitted pay stubs stating gross pay to date of $59,589.25 through June 30, 2013. These amounts are less than the proffered wage, so the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which was $3,488.11 in 2012 and $42,110.75 in 2013.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's

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[2] The petitioner also submitted a 2011 Form W-2, but as that document covers a time prior to the priority date, it can be considered only generally.

gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River St. Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F. Supp. at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through

[3] Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. Current liabilities are obligations payable (in

6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The record before the director closed on November 30, 2012 with the receipt by the director of the petitioner's submissions in response to the director's Notice of Intent to Deny (NOID). As of that date, the petitioner's 2012 federal income tax return was the most recent return available. It states net income of $96,533 and net current assets (liabilities) of -$70,139.40.

Although the petitioner's net income exceeds the difference between the actual wage paid and the proffered wage, as noted by the director in his decision, the petitioner has sponsored 18 additional workers since the instant priority date. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner submitted no evidence of wages paid to other sponsored workers or evidence concerning their priority dates and proffered wages.

Counsel relies upon the Yates' Memorandum, which provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." The AAO consistently adjudicates appeals in accordance with the Yates Memorandum.

On appeal, counsel states that the petitioner paid $15,367.73 more than the proffered wages to all Form I-140 sponsored workers in 2012. Counsel also states, however, that the figures used to arrive at the number included salaries in excess of the proffered wage made to sponsored workers.[4] First, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, the information stated does not demonstrate that the petitioner has the ability to meet all of its salary obligations. Payments made in excess of the proffered wage to certain sponsored workers do not constitute available funds to pay the proffered wage to the beneficiary or other sponsored workers who did not receive a wage or less than the proffered wage in that year. Although counsel stated that a spreadsheet was available with each sponsored workers' proffered wage and actual wage received, no such document appears in the record. As such, USCIS cannot determine whether the petitioner has paid the proffered wage to each sponsored beneficiary as of each respective priority date.

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most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).

[4] Specifically, counsel stated that the total proffered salary amount for all sponsored workers in 2012 was $974,625 and that the petitioner paid its sponsored workers $989,992.73, which "include[ed amounts] actually paid above and beyond the proffered salary amount offered to them."

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonegawa,* 12 I&N Dec. at 614-15. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's 2011 and 2012 tax returns reflect sufficient net income to pay the difference between the actual wage paid and the proffered wage to the beneficiary, but the petitioner did not submit evidence concerning the proffered wage and actual wage paid to other sponsored workers so that its ability to pay the proffered wage to all sponsored workers cannot be determined. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende,* 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.